U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE: December 18, 1998
CASE NO: 1995-INA-00611

In the Matter of:

SACRAMENTO DENTAL CLINIC
Employer

On Behalf of:

KARIM RISMANCHI AMIRKHIZI
Alien

Certifying Officer Paul R. Nelson, Region IX

Appearance: James C. Wolf, Esquire
San Francisco, CA
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 28, 1993, Sacramento Dental Clinic ("employer") filed an application for labor certification to enable Karim Rismanchi Amirkhizi ("alien") to fill the position of Dental Ceramist at a monthly wage of $2,500 (AF 41). The job duties are described as follows:

> Cast porcelain, acrylic resin crowns and bridges, tooth facings from dentist prescription. Mix porcelain paste and acrylic resins to match tooth color. Use chemical analysis, measurement and fabrication instruments and furnace/baking equipment (AF 41).

The job requirements are a Bachelor's degree in Chemistry or Chemical Engineering, or Certification in Dental Ceramics by National Board for Certification.

On August 23, 1994, the CO issued a Notice of Findings proposing to deny the labor certification. The CO alleged that the employer violated § 656.21 (b)(2)(1)(A)(B) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, and be defined in the Dictionary of Occupational Titles (DOT). Specifically, the CO objected to the employer's requirement that all candidates possess a B.S in Chemistry or Chemical Engineering. The CO relied on the fact that this requirement is not listed in the DOT's description of Dental Ceramist. *See DOT Occupational Code 712.381-042.* Finally, the CO alleged that this requirement is a personal preference and tailored to meet the alien's background and qualifications. The CO therefore requested the employer to: (1) delete or alter the requirements and readvertise, or (2) demonstrate that the requirement is customary or normal for the position in the United States (AF 35).

In rebuttal, dated September 21, 1994, the employer argued that a Bachelor's degree in Chemistry or Chemical Engineering is not required. Rather, the employer contends that it wrote to the California Employment Development Department on February 14, 1994 and requested that Form ETA 750 be amended to read as follows:

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Minimum Requirements: Four years' experience in the job offered, or certification in dental ceramics by the national Board of Certification, or B.S. degree in chemistry or chemical engineering.

The employer argued that in the event the CO concluded that the B.S. requirement is unduly restrictive, this requirement still meets the business necessity standard as articulated by the Board in *Information Industries, Inc.*, 88-INA-82 (February 9, 1989). Specifically, the employer insisted that the B.S. requirement bears a reasonable relationship to the offered position, and therefore meets the business necessity standard.

The CO issued the Final Determination on October 28, 1994 denying the labor certification. The CO reiterated the reasons listed in the NOF alleging that the employer failed to adequately rebut the NOF issue. On November 30, 1994, the employer requested review of Denial of Labor Certification pursuant to § 656.26(b)(1)(AF 2).

Discussion

The issue presented by the appeal is whether the alternate experience refinement of a Bachelor's degree in Chemistry or Chemical Engineering is unduly restrictive under § 656.21(b)(2) of the federal regulations.

We have recently considered the use of alternative experience requirements *en banc* in the matters of *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb 2, 1998) (*en banc)*. In *Kellogg* we held first that any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the D.O.T.[2], and shall not include requirements for a language other than English (20 C.F.R. § 656.21(b)(2)). However, there are legitimate alternative job requirements, which can, and should be permitted in the labor certification process. But, these alternatives must be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative requirement is found to be substantially equivalent to that primary requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered as normal for a § 656.21(b)(2) analysis.

Secondly, we held in *Kellogg* that where the alien does not meet the primary job requirements, but only potentially qualified for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that

[2] The job requirements listed in D.O.T. definitions are found in the definition trailer. Those requirements relate to levels of physical demands, general educational development, and specific vocational preparation.

applicants with any suitable combination of education, training or experience are acceptable. See, *Kellogg, supra*.

Clearly the instant case has not been considered in light of our decision in *Kellogg*, and there are no other grounds cited by the CO in the final determination. Therefore, this matter will be Remanded for reconsideration and possible re-advertisement in light of our holding in *Kellogg*.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for appropriate action.

RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, dissenting:

I respectfully dissent from the majority and find that the CO's decision should be affirmed. As noted by the majority, the issue presented by this appeal is whether the alternate experience requirement of a Bachelor's degree in Chemistry or Chemical Engineering is unduly restrictive under § 656.21(b)(2).

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been defined for the job in the DOT and are normally required for a job in the United States. *Ivy Cheng*, 93-INA-106 (June 18, 1994). *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989 (*en banc*).

The majority believes the CO's decision should be vacated and remanded so that this appeal may be considered in light of our recent *en banc* decision in *Kellogg*, wherein we discussed the use of alternate requirements. *Kellogg* refines the issues involved in the alternate requirement debate, making it more difficult for the employer to validly use a "permissive" alternate requirement. However, I would find that there is sufficient case law existing prior to *Kellogg* that supports the finding that the Bachelor's degree requirement was unduly restrictive.[3]

The Board considered the issue of suitable, alternate requirements in *Intexmezzo, Inc., t/a Ristorante Portofino*, 94=INA-25 (March 8, 1995), and held that the addition of an alternate

[3] The majority presumably is of the opinion that had *Kellogg* been decided prior to this application, the employer would have realized the folly of its position and not advertised the alternate requirement of a Bachelor's degree in Chemistry or Chemical Engineering.

requirement may be deemed restrictive rather than expansive when the alternative requirement is tailored to the alien's background. In that case, the employer sought a cook with four years of experience in the job offered, or four years of alternate experience as a kitchen helper. The Board denied certification, reasoning that there was no indication that the job duties of a kitchen helper elated to the position of cook. Similarly, in the instant case, I find that the alternate job requirement — a Bachelor's degree in Chemistry or Chemical Engineering — is not sufficiently related to the position of Dental Ceramist. The finding is supported by the fact that there is no evidence in the record which indicates that the alien possesses experience in the field of Dental Ceramics. Moreover, I do not believe that the Bachelor's degree requirement is appropriate in light of the other significantly more applicable job requirements of four years of experience as a Dental Ceramist or certification in Dental Ceramic. In that connection, I make reference to the job description of Dental Ceramist in the *DOT* which states:

> Applies layers of porcelain or acrylic paste over metal framework to form dental prostheses, such as crowns, bridges, and tooth facings, according to prescription of DENTIST (medical ser.) 072.101-010: Mixes porcelain or acrylic paste according to prescription to match color of natural teeth. Applies layers of mixture over metal framework, using brushes and spatula. Brushes excess mixture from denture and places denture in furnace to harden. Removes denture from furnace, brushes on additional layer of mixture, and shapes mixture, and shapes mixture to contour of denture, using spatula. Repeats mixture-application process and baking until denture conforms to specifications. Verifies accuracy of tooth dimensions and occlusion of teeth, using micronometer and articulator. Cleans and polishes dental prostheses, using ultrasonic machine and polishing machine. *See DOT*, 712.381-042.

There are no duties in this job description sufficiently related to the education or training associated with a Chemistry or Chemical Engineering degree. In addition, the Specific Vocational Preparation (SVP)[4] for this position is over two years and up to and including four years. Specific vocational training consists of training given in the following circumstances: vocational education, apprenticeship training, in-plant training, on-the-job training, and experience in other jobs. I emphasize that vocational education, according to the *DOT*, includes high school, technical school, and only "that part of college training which is organized around a specific vocational objective." *See DOT, Appendix C.* It is untenable to argue that college training in Chemistry or Chemical Engineering is organized around the specific vocational objective of a career in Dental Ceramics. Therefore, I cannot accept the argument that the alternate Bachelor's degree requirement is appropriate to and related to the job duties of a Dental Ceramist. *See Avanti Restaurant & Club*, 93-INA-320 (Sept. 27, 1994) (where a request of nine months training in hotel management is an alternate experience requirement, and it is appropriate to and related to the job, such a requirement is not unduly restrictive). Based on the foregoing, I find that the Bachelor's degree requirement was listed solely to qualify the alien for the offered position, which is in violation of § 656.21(b)(5). Accordingly, I would affirm the CO's denial of labor certification.

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[4] SVP is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for the average performance of a job. *See DOT, Appendix C.*

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.